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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1219

WILLIAM R. HILL, JR.,
PETITIONER,

v.

SPERRY RAND CORPORATION,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Petitioner, William R. Hill, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the case of *Sperry Rand Corporation* v. *William R. Hill, Jr.* on January 18, 1966.

Opinions Below

The United States District Court for the District of Massachusetts wrote an opinion denying respondent's motion for judgment notwithstanding the verdict or, in the

alternative, for a new trial. This opinion has not been reported. It is printed as Appendix A to this petition.

The opinion of the United States Court of Appeals for the First Circuit is reported in 356 Fed.2d. 181. It is printed as Appendix B to this petition.

Jurisdiction

The judgment of the Court of Appeals was entered on January 18, 1966. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

1. Did the Court of Appeals, in setting aside the jury's $250,000 verdict, which was supported by special findings of fact, usurp the function of the jury and deprive petitioner of the right to a jury trial guaranteed him under the Seventh Amendment to the Constitution of the United States:

(a) by rejecting facts supported by substantial evidence and found by the jury in response to special questions;

(b) by making findings of fact inconsistent with facts which the jury, in response to special questions, found on the basis of substantial evidence;

(c) by placing reliance upon its own distortion of evidence and misstatements of undisputed facts, including an appellate finding that petitioner was guilty of conduct giving rise to estoppel because, among other things, he did not, in March of 1961, discuss publication of the libelous article with a close friend and alleged co-author who, as a matter of undisputed fact, had been dead since December of 1959;

(d) by re-examining testimony, weighing conflicting evidence and searching the record for a way to defeat petitioner's recovery because of an expressed disbelief of petitioner's testimony;

(e) by failing to consider the evidence in the light most favorable to petitioner;

(f) by failing to give petitioner the benefit of all reasonable inferences from the evidence;

(g) by combining the techniques described in (a) through (f) so as to avoid the only legitimate legal issues presented by the appeal and to invoke against petitioner the doctrine of estoppel, which had been neither alleged, proved nor argued by respondent in the District Court;

(h) by permitting the respondent which, at its own request, had submitted certain evidence to the jury solely in mitigation of damages, to successfully assert, for the first time on appeal, that this same evidence gave rise to estoppel;

(i) by setting aside the jury's special finding of $50,000 in compensatory damages on the asserted ground that the compensatory award under the law of libel was not segregated from that made under the New York statute, while at the same time holding that petitioner was entitled to compensatory damages for libel and ignoring the District Court's charge that the jury could not twice compensate petitioner for the same injuries.

(j) by failing to consider the jury's special findings of fact against the background of the District Court's charge, and

(k) by completely ignoring the trial judge, who heard the evidence and observed the witnesses during the course of a fourteen day trial and who, after a careful review of the case over a period of two months,

denied respondent's post trial motions in the following terms:

> "On the evidence the jury could reasonably have found, among other facts, that the study and findings described in the offending article were fictitious; that the plaintiff's good name, standing and reputation in the medical profession were knowingly misused by the defendant to give both the sham study and spurious findings (including the 'scare' allusion to cancer) the ring of authenticity; that the preparation and publication of the article, the unauthorized use of the plaintiff's name, and the ensuing massive advertising campaign based on the article were an elaborately planned and deliberately executed scheme to exploit the plaintiff's standing and reputation in the field of dermatology for the purpose of promoting the sale of the defendant's electric shaver; that the defendant acted in reckless and wanton disregard of the plaintiff's reputation and knowingly used the plaintiff's name for advertising purposes without his consent." (Appendix A)

2. Did the Court of Appeals abuse its discretion and thereby deny petitioner the due process of law guaranteed him under the Fifth Amendment to the Constitution of the United States, by assessing against him full appellate costs in the amount of $7,399.50?

Constitutional Provisions, Statutes and Rules Involved

The Constitutional provisions are (a) the due process provision of the Fifth Amendment and (b) the Seventh Amendment, which provides as follows:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

The statute involved is Article 5 of the New York Civil Rights Law. The pertinent sections of this statute are printed as Appendix C to this petition.

The rule involved is Rule 31(3) and (4) of the Rules of the United States Court of Appeals for the First Circuit. The pertinent portions of this rule are printed as Appendix D to this petition.

Statement of the Case

Petitioner commenced this action in the United States District Court for the District of Massachusetts on February 1, 1962 (R. 1). The complaint alleges facts constituting claims for libel, invasion of privacy and violation of Article 5 of the New York Civil Rights Law (R. 7-11).

Although the libel was published throughout the United States, petitioner confined his libel claim to the laws of the states of New York and Massachusetts (R. 295). Petitioner's statutory claim was based on the New York statute as judicially construed (R. 295-296). His claim for a common law invasion of privacy was waived during the course of the trial.

The case was tried for fourteen (14) trial days in January and February, 1965 (R. 5-6). On February 5, 1965, the jury returned a verdict for the petitioner in the amount of Two hundred fifty thousand dollars ($250,000) and judgment for that amount was entered on February 9, 1965 (R. 6). On February 15, 1965, respondent moved for judgment

notwithstanding the verdict and, in the alternative, for a new trial (R. 6). These motions were denied on April 23, 1965, and respondent appealed (R. 6-7).

The evidence relied upon by petitioner to sustain the verdict showed the following facts:

Petitioner, William R. Hill, Jr., M.D., is a resident of Belmont, Massachusetts (R. 30). He was graduated from the College of the Holy Cross in 1929, and from the Medical School of Harvard University in 1933 (R. 31). He interned at Worcester City Hospital and was admitted to the practice of medicine in 1935 (R. 31). In 1937, he served as an Assistant in the Department of Medicine at Johns Hopkins Hospital in Baltimore, Maryland (R. 31). From 1937 to 1939, he was an instructor in dermatology at the University of Pennsylvania (R. 31). He was a Fellow in Dermatology at the Mayo Clinic in Rochester, Minnesota from 1939 to 1940 (R. 31). In 1939, he returned to Massachusetts where he has practiced medicine ever since, specializing in dermatology (R. 30-32).

Dr. Hill has been an instructor in dermatology at Harvard Medical School since 1940 (R. 31-32). He is chief of the dermatology department of Mount Auburn Hospital in Cambridge, Massachusetts and he served as Assistant Dermatologist on the staff of Massachusetts General Hospital in Boston until February, 1962 (R. 31). He also is a member of the American Medical Association, the Massachusetts Medical Society, the New England Dermatological Society and the American Academy of Dermatology (R. 31).

Since 1938, Dr. Hill has authored many scientific articles in the field of dermatology, which have been published in leading medical journals in the United States (R. 32-39). In addition, he is the co-author of a book entitled "Argyria" (R. 32). This book deals with the pharmacology of silver and is used in the libraries of medical schools (R. 32-33). Dr. Hill has never authored an article for the purpose of

promoting a product or advancing a commercial interest (R. 66). He is a well-known dermatologist who, until publication and distribution of the article hereinafter described, and reprints thereof, enjoyed an excellent reputation as a teacher, practicing physician and author of learned and ethical articles of nationwide distribution in the field of dermatology (R. 389-393, 32-39).

Respondent, Sperry Rand Corporation, is a Delaware corporation which, through its Remington Rand Division, manufactures and sells electric shavers (R. 7, 21). Respondent's principal places of business in connection with the manufacture and sale of electric shavers are New York City and Bridgeport, Connecticut (R. 215-216, 621).

In June of 1958, one Paul I. Murphy, who describes himself as a specialist in "medical public relations," (R. 746, 898) contacted respondent with a scheme to promote sales of respondent's electric shavers (R. 321-322, 898-901). Murphy, sole proprietor of Medical Research Association, (R. 748) proposed to arrange for publication in a leading medical journal of an article favorable to respondent's electric shavers (R. 898-901). The article would bear the by-lines of doctors having affiliations with well-known medical schools, would be widely publicized in the national press and magazines, and would serve as the basis for an advertising campaign (R. 898-901). In order to impress respondent with "the far reaching power of our service," Murphy pointed with pride to a satisfied customer whose sales of Vodka "went soaring as never before in Vodka history" after Murphy had arranged for nationally known doctors to extoll the merits of Vodka and had publicized their praise in 1600 newspapers in the United States (R. 898).

Respondent was duly impressed and in November 1958, after numerous meetings with Murphy and his associates, respondent and Medical Research Association (MRA) en-

tered into an agreement (R. 224, 905-912). This agreement was set forth in two letters executed by respondent and MRA (R. 905-912).

The first letter was dated November 10, 1958 (R. 905). It provided that a "protracted medical research study" was to be performed by a team of three dermatologists on the staffs of leading institutions and the dermatologists selected had to be "agreeable" to respondent (R. 906). The subjects of the study were to be approximately 240 males and 60 females (R. 906). The study was to be conducted according to protocol previously established and agreed upon by MRA and respondent (R. 906, 913-918). MRA agreed to make progress reports to respondent every 30-45 days and to keep confidential any unfavorable findings (R. 906). After completion of the study, a medical report bearing the by-lines of the three doctors was to be prepared for publication in a mutually agreed upon national medical or scientific journal (R. 907). However, the report was not to be submitted for publication without being reviewed and approved in writing by respondent (R. 907). MRA, subject to the approval and control of respondent, was to obtain newspaper and magazine publicity throughout the United States and Canada (R. 907-908).

The second letter was dated November 11, 1958 (R. 908). It provided that respondent would be permitted to use the research as a basis for advertising claims, provided the names of the physicians and their institutions were not used (R. 908). This proviso was agreed to be necessary under the established rules of ethics of the American Medical Association (R. 909). Nevertheless, respondent would be permitted to make mailings of the medical journal report to members of the general public, as well as to doctors and medical institutions (R. 909). It was agreed that nothing would be published without first being reviewed and approved in writing by the physicians (R. 909). It was

further agreed that MRA would receive $35,000 to cover the research, the three dermatologists, the medical journal report and the reading of the report before a medical convention (R. 910). MRA would receive an additional $50,000 for placing a story in 500 newspapers quoting one or more of the dermatologists and mentioning the trade name of respondent's electric shaver (R. 910). Finally, if respondent wanted MRA to place magazine publicity, it would pay for the same according to a schedule of rates (R. 911). This schedule ranged from $15,000 for the American Legion Magazine to $50,000 for the Reader's Digest (R. 911).

The two letters, taken together, constitute the contract between respondent and MRA relative to the project in question (R. 224) and, in executing them, respondent intended to and did appoint MRA (Murphy) its "exclusive agent." (R. 918) Moreover, Murphy clearly understood that he represented respondent (R. 500).

Between November of 1958 and March of 1961, representatives of respondent met and corresponded regularly with representatives of MRA. Respondent examined drafts of the shaving article pursuant to its contractural right of review and approval, and requested a number of changes, which were incorporated in the article as finally published (R. 267-282, 919-944, 946-947, 974). Respondent also emphasized to MRA the importance of avoiding publicity that would simply be institutional (R. 945). Respondent insisted that a basic requirement of publicity would be not only the inclusion of the brand name of its electric shaver (Remington), but the exclusion of competitive brand names (R. 945).

When the article was completed, it was submitted to the American Medical Association Journal, which was respondent's first choice. The AMA Journal rejected the article (R. 725, 949). It was also submitted to and rejected by the

New England Journal of Medicine (R. 725). Thereafter, the article was offered to and accepted by GP, the official publication of the American Academy of General Practice (R. 725, 882-890).

By December of 1959, respondent expected publication of the article in the Spring of 1960 (R. 949). In anticipation of such publication, respondent and MRA worked on news releases and other publicity which would be attendant upon the article (R. 949, 960-961). As part of this planning, Edmund F. Finnerty, Jr., M.D., the alleged principal author of the article, went to the Pan American Medical Convention in Mexico City on May 4, 1960, where, by prearrangement, he was supposed to read the article and then be named outstanding dermatologist of the year (R. 949-950, 961, 986). This trip was made at respondent's expense through funds advanced by Murphy (R. 787-788). Dr. Finnerty was listed in the program of the convention as a speaker and the shaving paper was set forth as his topic (R. 997) However, Dr. Finnerty changed his mind and did not read the paper because it contained too many references to respondent's adjustable roller combs (R. 726-727). On May 4, 1960, while Dr. Finnerty was speaking in Mexico City, MRA issued a news release about his speech; the release was entitled "Cancer and Shaving." (R. 964-973) On the same day, stories appeared in the New York Times and the New York Post reporting that Dr. Finnerty had linked skin cancer to blade shaving. The Post story stated that he had predicted a trend to filtered shaving and had pointed out that one electric shaver manufacturer equipped its shavers with comb like rollers (R. 308, 963, 987-988).

These publications, with their emphasis on cancer, caused respondent some concern (R. 308). As a result, it was agreed with MRA that a new release would be prepared with no more than a fleeting reference to malignancy (R. 962, 987). It would be made available only to science

writers of the wire services in order to insure better control and less tampering and it would be released May 20, 1960, the date on which the shaving article was to be published in GP, having been submitted to that organ in January of 1960 (R. 962, 987, 1016).

However, when Finnerty returned from Mexico City, he had a dispute with his superiors at Tufts University School of Medicine concerning his speech before the convention (R. 989). As a result, he resigned from his teaching position (R. 678, 681). This development caused respondent to instruct Murphy to withdraw the article and attendant publicity from publication on May 20, 1960 (R. 989). It did not appear until ten months later.

In March of 1961, respondent and MRA finally caused the shaving article to be published. It appeared in GP, Volume XXIII, Number 3, pp. 86-93 (R. 881-890). It was entitled "MODERN SHAVING TECHNIQUES IN RELATION TO LESIONS OF THE SKIN". Through publication in GP, the article was distributed to 30,000 physicians and 2,000 additional subscribers throughout all the states of the United States and in foreign countries (R. 589).

Under the title of the article appeared the names and medical school affiliations of the alleged authors, Edmund F. Finnerty, Jr., M.D. of Tufts University School of Medicine, William R. Hill, Jr., M.D. of Harvard University Medical School and Salvatore J. Messina, M.D. of Boston University School of Medicine (R. 883). As respondent and Murphy knew, Dr. Messina had been dead since December of 1959 (R. 39, 959) and Dr. Finnerty had not been affiliated with Tufts since May of 1960.

The article described an alleged study of the effect upon human skin of various shaving devices and concluded that electric shavers, in general, and Remington electric shavers, in particular, had "many advantages in the management and prevention of common dermatologic problems." (R.

13-19) The article contained no less than 11 refeernces to adjustable roller combs and, just so there would be no mistake, it pointed out that these were exclusive with Remington (R. 15-19). There was no indication in the article that respondent had financed its publication as well as the alleged study upon which it was supposed to be based.

By designating Dr. Hill as an author and by use of the words "we", "us" and "our", the article represented that Dr. Hill had participated in its preparation and in the alleged study and that it incorporated the results and conclusions of his work (R. 13-19). In fact, Dr. Hill had not participated in any such study, had in no way assisted in the preparation of the article, was not an author of the article, had not given oral or written permission for the use of his name in connection with the article, and had no knowledge or information that the article was to be published or that his name was to be associated with it (R. 41, 867).

The study described in the article was a sham and the reported findings were fictitious (R. 876). Thus, while Dr. Finnerty, the alleged principal author generally keeps records of his patients for an indefinite period, and while the subjects of the study supposedly came solely from his practice, contrary to the assertions in the article, he claimed to have destroyed every pertinent record pertaining to the study, even before the article was published (R. 707-711). Moreover, he could not identify a single subject of the study, not even those specially listed as case reports in the article (R. 709-711). His failure of memory and records in this regard even extended to the 64 year old man, whose cancerous left ear was photographed and inserted in the article (R. 710-711). Dr. Finnerty admitted that the plural personal pronouns used in the article were false, as was the statement that, "The study begun in June, 1958, was performed on 249 men and 120 women from our respective

practices." (R. 710, 728-729) In fact, a dermatologist reading the article would seriously question that the study described therein could have been completed in one year, as claimed (R. 380, 423). Certainly, Dr. Finnerty, who sees 300 to 400 patients per week for 5 to 10 minutes each, could not have accomplished this feat (R. 714).

The article was a fraud from conception to publication. It was conceived by Murphy and adopted by respondent as an advertising and promotion scheme for Remington electric shavers (R. 876, 898-912). Its preparation and content were subject to the control and veto power of respondent, and its publication in a national medical or scientific journal could and did take place only after it was reviewed and approved by respondent (R. 267-282, 898-912, 919-944, 946-947, 974). When published, the article was to serve, and did serve, as the basis for a massive nationwide advertising campaign by respondent in the country's leading newspapers and magazines and on television (R. 462, 497-498, 891-896, Exhibit 35). Respondent measured the results of advertisements and found they had unusually high readership scores (R. 469).

As part of such advertising campaign, respondent distributed reprints of the article throughout the United States, including Massachusetts and New York (R. 1009-1012). The availability of the reprints was widely advertised in newspapers and magazines distributed throughout the United States, including Massachusetts and New York (R. 462, 497-498, 891-896, Exhibit 35). Some of these advertisements described the study as:

> ". . . conducted and supervised by three skin specialists — doctors of medicine — who are associated with the dermatology departments of medical schools and hospitals of the highest repute,"

thereby referring and intending to refer to Dr. Hill (R. 892, 894; see also R. 893, 895, Exhibit 35).

Requests for reprints were directed to a New York post office box rented for respondent by Murphy (R. 334, 891-896, Exhibit 35). These requests were honored by respondent (R. 334, 997, 1009-1012, Exhibit 27). The reprints included Dr. Hill's name and medical school affiliation and represented him as an author of the article and participant in the study (R. 13-19, 977).

Publication of the article and distribution of the reprints by respondent and its agent have done great harm to Dr. Hill's reputation (R. 52-54, 75-78, 389-393). The article, which bears his name and medical school affiliation, was written and used for commercial purposes. It is highly improper for a physician to write an article for a medical journal for the purpose of promoting a product or advancing a commercial interest (R. 388-389). If the medical editor of GP had known of respondent's sponsorship and control of the article, it would not have been published (R. 587-588). Moreover, the article is unscientific, vague, statistically unsound, inconsistent, and poorly written from a medical point of view, and it arrives at false, ridiculous and unsupported conclusions (R. 85-94, 376-389). This is particularly true of the scare reference to cancer resulting from a single razor cut (R. 80-83, 86-87, 387). It is irrational to suppose that a single razor cut can cause skin cancer (R. 87, 387). The article has been severely criticized by physicians, both as to validity and ethics (R. 52-54, 75-78, 376-389, 577-588).

Dr. Hill's bibliography represents a lifetime of work and it is very important to his academic standing, his dealings with associates and his medical practice (R. 78). The article in question has become a permanent part of the medical literature and of Dr. Hill's bibliography (R. 589). So

far as the medical profession is concerned, it stands as the most recent writing attributable to Dr. Hill (R. 78).

As a result of the foregoing, Dr. Hill has been brought into disgrace and disrepute and has become the subject of scorn, ridicule and contempt in the medical profession (R. 52-54, 75-78, 389-393). Since publication of the article, he has lost referral work from both Massachusetts and New York (R. 65-67). In 1961, he was Assistant Dermatologist at Massachusetts General Hospital, having held that position for almost 20 years. Massachusetts General Hospital is the teaching hospital for Harvard Medical School (R. 47-48). The article caused considerable adverse comment at the hospital and he was demoted in 1962 from Assistant Dermatologist to Clinical Associate (R. 48-54, 897). As Assistant Dermatologist, he held his office in the Warren Building as a matter of right (R. 54). However, as Clinical Associate he does not have a staff appointment and may be removed from the Warren Building at any time (R. 54). In addition, he has suffered sleeplessness, embarrassment, humiliation, emotional distress and mental anguish (R. 69-72). His emotional distress was made even worse by virtue of the fact that his wife had been hospitalized with a severe emotional breakdown in 1960 and, during the crises resulting from the article, his troubles piled up on her (R. 72). Finally, Dr. Hill's reputation as an author of scientifically sound and ethical medical articles has been greatly damaged, if not totally destroyed (R. 392-393).

The conduct of respondent and its agents, which caused the damage to Dr. Hill, was willful and malicious (R. 876). They all knew that Dr. Hill had nothing whatever to do with the article, that it was in fact co-authored, in rough form, by Murphy and Dr. Finnerty, and that it was written in final form by one Martha Dana, a professional medical writer (R. 41, 302, 729, 780-781, 826-827, 959). Indeed, the

paper was referred to in the respondent organization as "Mr. Murphy's article" (R. 985-986) or "Dr. Finnerty's report" (R. 960).

Early in 1959, it occurred to respondent's vice-president and general manager that an investigation should be made to insure that the research was being properly performed and that the article was factually correct (R. 595, 598-599). However, this was not done (R. 599).

Although respondent's contract with Murphy provided that nothing would be published without written approval from all three doctors (R. 909), this protective provision was ignored. In fact, the one time when Dr. Finnerty attempted to exercise a right of approval by editing one of respondent's advertisements, Murphy threatened that unless Dr. Finnerty approved the ad copy as it stood, the next one would be worse (R. 742).

Respondent and its agents never communicated with Dr. Hill in any way and had no oral or written permission from him to use his name in connection with the article (R. 41, 502, 827-828). The lack of written authority finally became the object of comment by respondent's vice-president and general manager one month after the article appeared (R. 617), but still no investigation of such authority was made, even though the advertising campaign was then about to be launched. In fact, respondent deliberately avoided contact with Dr. Hill, despite the desire of its advertising agency, expressed as early as July of 1960, to meet with all the alleged authors of the article and probe the details of the study (R. 556). Instead, respondent attempted to insulate itself by closing its corporate eyes to all danger signs and confidently allowing Murphy to act in its behalf (R. 302-303, 308, 331, 551-564, 962, 987). Even Dr. Finnerty's attempts to reduce the blatant commercialism of the article were ignored or overruled (R. 669) and his efforts to halt the advertising campaign in October, 1961

were unsuccessful, although he told respondent its advertising was ridiculous and false (R. 981-984, 990-991).

The fact that no contact was made with respondent by or in behalf of Dr. Hill between March and November, 1961, while the matter was in his lawyer's hands and while he was engaged in an unsuccessful attempt to save his position at Massachusetts General Hospital (R. 45-54, 69-72, 74-78), did not prejudice respondent in any way. Thus, while respondent was put on notice of Dr. Hill's claim on November 6, 1961 (R. 527), it continued to distribute and solicit requests for reprints thereafter (R. 462, 474-483, 592-594, 896). Moreover, while respondent terminated its advertising campaign in the middle of December, 1961, such termination was a business judgment having absolutely nothing to do with Dr. Hill's claim. Some of the evidence supporting this fact came from the president of respondent's Electric Shaver Division. It shows respondent's cold indifference to the consequences of its conduct and, in view of the estoppel ruling of the Court of Appeals, it is so important that it should be set forth verbatim (R. 626-627):

> Q. At some point you become aware of the fact that the integrity of the Dermatologists' Report so-called was under attack?
>
> A. That the integrity of the report was under attack?
>
> Q. Yes.
>
> A. Yes, I think so.
>
> Q. What did you do about that?
>
> A. Nothing.
>
> Q. Nothing?
>
> A. Not that I recall.
>
> Q. Did you cause any investigation to be made relative to the facts with reference to the research or alleged research?

A. No.

Q. In other words, you at some point became aware that there was an attack made on the Dermatologists' Report and its authenticity?

A. Yes, that is correct.

Q. When I asked the question, I asked whether you did or whether you caused an investigation to be made?

A. No, I did not cause any to be made nor did I do it myself.

Q. When you first became aware that there was an attack made on the authenticity of the Dermatologists' Report, what, if anything, did you do?

A. Nothing.

Q. Did you do anything about the advertising program?

A. No.

Q. You didn't stop it?

A. No.

Q. Did you authorize it to continue?

A. I didn't have to.

Q. It was in progress?

A. That is correct.

Q. Did you have any apprehension about going forward with that advertising program?

A. No.

Q. Was it actually stopped?

A. Oh, yes, it stopped eventually. All advertising campaigns stop eventually because the theme you have wears out.

Q. Did the attack on the Dermatologists' Report have any bearing on the date of the stopping?

A. No, because I believe the attack on that report occurred very early in the advertising campaign. The

advertising campaign ran for some time. I don't know for how long.

Q. Did the institution of the lawsuit have any effect on the continuance or discontinuance of the campaign of advertising?

A. No.
Q. None?
A. None.

After considering all of the evidence, the jury returned with the following answers to 15 questions:

1. Did the plaintiff consent to the use of his name on the article?

Answer either Yes or No NO.

Note: If your answer to Question 1 is "yes," do not answer Questions 2, 3, 4, 5, 6, 7, 8, and 9.

2. Did Paul Murphy act as the agent of the defendant with reference to the research study and the preparation and publication of the article?

Answer either Yes or No YES.

3. Did the defendant either through Paul Murphy acting as its agent or by joint action with Paul Murphy cause the preparation and publication of the article and the use of the plaintiff's name in connection with the article?

Answer either Yes or No YES.

4. Was the attribution of the article to the plaintiff defamatory?

Answer either Yes or No YES.

Note: If your answer to Question 4 is "no," do not answer Questions 5, 6, 7, 8, and 9.

5. Did the publication and distribution of the article in Massachusetts cause the plaintiff to sustain loss of reputation?

Answer either Yes or No YES.

6. Did the publication and distribution of the article in Massachusetts cause the plaintiff mental pain and suffering?

Answer either Yes or No YES.

7. Did the publication and distribution of the article in the State of New York cause the plaintiff to sustain loss of reputation?

Answer either Yes or No YES.

8. Did the publication and distribution of the article in the State of New York cause the plaintiff mental pain and suffering?

Answer either Yes or No YES.

9. In your judgment should the plaintiff, in addition to compensatory damages, be awarded exemplary damages in connection with the publication or distribution of the article *within the State of New York?*

Answer either Yes or No YES.

10. Did the defendant use the name of the plaintiff for advertising purposes within the State of New York without having first obtained the written consent of the plaintiff?

Answer either Yes or No YES.

Note: If your answer to Question 10 is "no," do not answer Questions 11, 12, and 13.

11. Did the plaintiff sustain loss of reputation and mental pain and suffering by reason of the use of his name for advertising purposes within the State of New York?

Answer either Yes or No YES.

12. Did the defendant *knowingly* use the plaintiff's name

in the State of New York for advertising purposes without first having obtained the written consent of the plaintiff?

Answer either Yes or No YES.

13. If the answer to Question 12 is "yes," the jury, in its discretion, may award exemplary damages.

In your judgment, in addition to compensatory damages, should exemplary damages be imposed upon the defendant for having knowingly used the plaintiff's name for advertising purposes without first having obtained his written consent?

Answer either Yes or No YES.

14. Answer this question only if your answer to Questions 5, 6, 7, 8, and 11, or to any of them, is "yes."

What amount will compensate the plaintiff for any loss of reputation and mental pain and suffering he sustained as the result of the publication and distribution of the article?

Answer in dollars $50,000—

15. Answer this question only if your answer to Question 9 or to Question 13 or to both questions is "yes."

In your judgment what is the appropriate amount in dollars that the plaintiff is entitled to be awarded as exemplary damages?

Answer in dollars $200,000

(s) GEORGE G. CORMIER
GEORGE G. CORMIER
(Foreman)

Reasons for Granting the Writ

1. THE FACTS TRIED AND FOUND BY THE JURY WERE RE-TRIED, RE-EXAMINED, DISTORTED AND MISSTATED BY THE COURT OF APPEALS SO AS TO NULLIFY THE UNANIMOUS FINDINGS AND VERDICT OF IMPARTIAL MEN AND WOMEN AND TO DEPRIVE PETITIONER OF THE RIGHT TO A JURY TRIAL GUARANTEED UNDER THE SEVENTH AMENDMENT.

Counsel for petitioner represents to this Court that when he stood up to argue this case before the Court of Appeals, the Chief Judge and ultimate author of the court's opinion, instructed him to address himself to an explanation of how the jury could have believed Dr. Hill. The Chief Judge then went on to state the portions of Dr. Hill's testimony that he disbelieved. His attitude in this regard was ultimately reflected in the court's reluctant *pro forma* acceptance of the jury's specifically expressed belief of Dr. Hill.

Nowhere is this eagerness of the Court of Appeals to replace the jury more apparent than in the court's own opinion. Thus, the court notes the undisputed fact that Dr. Messina died in December, 1959 (Appendix B, p. A-8). However, two pages later, while attempting to justify the invocation of the doctrine of estoppel, the court condemns Dr. Hill for not speaking of the article to Dr. Messina in March of 1961 (Appendix B, p. A-10). A plaintiff in a civil case has many burdens to discharge, but communing with the dead is certainly not one of them.

The doctrine of estoppel by which the court defeated petitioner's recovery under the New York Civil Rights Law (Appendix C) was based on other improper appellate findings of fact. For example, the court stated that respondent's national advertising campaign commenced in July, 1961 and held that petitioner was estopped to "deny

his authorship in order to recover damages accruing on or after July, when the New York advertising commenced" (Appendix B, pp A-10, A-13). However, Exhibit 35, which by stipulation was before the court in its original form because it contained a large number of cumbersome advertisements, and the testimony relating to that exhibit (R. 497-498) showed that advertisements soliciting requests for reprints were published in newspapers throughout the nation, including Massachusetts and New York, on May 10 and May 24, 1961. This same evidence established that such advertisements were given further currency in Massachusetts, New York and throughout the country by publication in the following magazines during May and June, 1961:

Life	—	May 9 and June 2
Drug Topics	—	May 22
Sports Illustrated	—	May 25 and June 5
Time	—	May 26
Look	—	June 6 and June 20
Saturday Evening Post	—	June 17

One of the more egregious findings of the Court of Appeals in connection with the doctrine of estoppel was that respondent was misled to its injury by petitioner's silence. In this regard, the court found that prior to the New York advertisements, by the simple act of writing a letter, petitioner could have forestalled further publication and distribution of the reprints (Appendix B, p. A-11). In support of this finding, the court made the further subsidiary finding that respondent took immediate steps to discontinue distribution of the article upon being notified of petitioner's claim (Appendix B, p. A-12). However, these matters were among the most hotly contested issues at the trial and were the subjects of conflicting evidence.

The Court of Appeals chose to believe the testimony of Robert Clarke, respondent's advertising manager, (R. 528-529) while ignoring contradictory evidence.

Thus, the president of respondent's Electric Shaver Division, who was Mr. Clarke's superior, testified that neither the attacks on the integrity and authenticity of the article nor this litigation had any bearing upon the decision to discontinue the advertising program, which included reprint distribution. Respondent ignored these matters. The advertising campaign ran its course and when it stopped, it was merely because the theme had worn out (R. 626-627). The accuracy of this testimony is corroborated by the fact that Dr. Finnerty's attempts to halt the advertising campaign in October, 1961 were unsuccessful, even though he notified respondent in writing that its advertising was ridiculous and false (R. 981-984, 990-991). Moreover, while respondent was put on notice of Dr. Hill's claim on November 6, 1961, it continued to distribute and solicit reprints thereafter (R. 462, 592-594, 896 and see 474-483). Two of these solicitations were contained in advertisements published in Life and Look on November 17 and November 21, respectively (R. 896, Exhibit 35-Ad No. 73).

The Court of Appeals had some difficulty with the estoppel doctrine when it had to deal with the misconduct and knowledge of respondent's agent, Paul I. Murphy. This problem was resolved by appellate findings that respondent had no independent knowledge of petitioner's lack of participation and consent, that its ignorance was not unreasonable, and that respondent was not chargeable with Murphy's knowledge because his interests were adverse to those of respondent and his conduct was a fraud upon respondent (Appendix B, pp. A-12, A-13). To complete the picture the Court of Appeals found that respondent had no doubt

or reason to doubt that the study was fully and properly carried out (Appendix B, p. A-8).

These findings constitute an outrageous usurpation of the jury's function. In his Statement of the Case, petitioner has set forth facts, supported by substantial evidence, showing that respondent either knew or should have known that Dr. Hill had nothing to do with the article and did not consent to the use of his name; that any professed ignorance on respondent's part was deliberately self-imposed and was, at best, attributable to a wanton and reckless disregard of Dr. Hill's rights; that respondent had plenty of reason to doubt the validity and authenticity of the alleged study, but chose to feign corporate blindness; that respondent and Murphy had identical interests, i.e., to prostitute the medical profession for personal gain and to cash in on the universal fear of cancer; and that, far from being defrauded by Murphy, respondent, at worst, was fully aware of its agent's conduct and, at best, was guilty of gross negligence in consciously abdicating its right and responsibility to supervise and control such conduct. The findings of the Court of Appeals are necessarily based on a failure to consider the evidence in the light most favorable to petitioner, and a failure to give petitioner the benefit of all reasonable inferences from the evidence.

The appellate search of the record for a way to defeat petitioner's recovery is made manifest by still another vital factor, namely, that the defense of estoppel was never alleged, proved or argued by respondent in the District Court. The Court of Appeals dismissed this as a highly technical point and noted that the defense of estoppel was "asserted under the banners of 'ratification', 'laches', and 'mitigation of damages'" (Appendix B, p. A-11). However, the court overlooked the fact that these matters are separate affirmative defenses to be alleged and proved under

Rule 8(c) of the Federal Rules of Civil Procedure. More importantly, the court ignored the fact that the evidence relied upon to establish estoppel in the Court of Appeals was submitted to the jury solely in mitigation of damages pursuant to the following instruction requested and received by respondent: (R. 839, 842, 862, 864)

> "If you find that Dr. Hill's delay in complaining to the defendant justified a reasonable belief on the part of the defendant that Dr. Hill had given permission for the use of his name, leading the defendant to distribute the reprints and the advertisements, then you should award Dr. Hill a lesser amount of damages than you would otherwise give him. In this regard, the attorneys for Dr. Hill are his agents, and any delay on their part in notifying the defendant of Dr. Hill's claim is chargeable to him."

The foregoing discussion demonstrates how the Court of Appeals invaded the jury's province so as to free respondent from liability under the New York statute for using petitioner's name for advertising purposes without his written consent. It mattered not to the court that respondent, Murphy and Finnerty were all aware that there was nothing in writing from Dr. Hill (R. 502, 729, 827-828). The court merely estopped Dr. Hill to deny his authorship, although respondent and its agents also knew that Dr. Hill did not participate in writing the article (R. 302, 729, 780-781, 826-827, 959). But this was not the extent of the court's invasion. It also deprived petitioner of the jury's award of punitive damages under the New York law of libel. This was accomplished by a ruling that the evidence was insufficient to establish respondent's reckless and wanton disregard of petitioner's rights (Appendix B, p. A-15). The lack of support for this ruling has been demonstrated

above. It is sufficient to note here that the jury were instructed that exemplary damages for libel could be awarded upon a finding that respondent acted recklessly or wantonly (R. 841). The award of such damages means that the jury made such a finding, and the District Court, after a careful review of the case, ruled that the finding was supported by substantial evidence (Appendix A).

Finally, the Court of Appeals set aside the jury's special finding of $50,000 in compensatory damages on the asserted ground that the compensatory award under the law of libel was not segregated from that under the New York statute (Appendix B, p. A-14). This ruling was made in the face of the court's concession that petitioner was entitled to damages for libel (Appendix B, p. A-14) and in disregard of the District Court's charge that the jury could not twice compensate the petitioner for the same injuries (R. 841). Since petitioner's injuries were identical, whatever his theory of recovery, the compensatory award should have been sustained if supported by either theory. Instead, the Court of Appeals ordered a new trial on the question of compensatory damages for libel.

Respondent was entitled to a reversal of the judgment entered upon the jury verdict only if not supported by substantial evidence, giving to petitioner the benefit of all conflicts in the evidence and all inferences that could reasonably be drawn from the evidence, considered in the light most favorable to petitioner. *Gunning* v. *Cooley*, 281 U.S. 90 (1930).

Appellate Courts are not to search the record to take cases away from the jury. *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U.S. 29 (1943); *Ellis* v. *Union Pacific Ry. Co.*, 329 U.S. 649 (1947); *Lavender* v. *Kurn*, 327 U.S. 645 (1946).

The right of the jury to select from conflicting inferences and conclusions that which it considers most reasonable is a right which cannot be ignored, whether it relates to causa-

tion, impact, damages or any other issue which is in conflict. *Tennant* v. *Peoria & P. U. Ry. Co.*, supra at 321 U.S. 35; *Sentilles* v. *Inter-Carribbean Shipping Corp.*, 361 U.S. 107 (1959).

In 1943, Mr. Justice Black, joined in dissent by Mr. Justice Douglas and Mr. Justice Murphy, examined and condemned the "gradual process of judicial erosion which in one-hundred-fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment." *Galloway* v. *United States*, 319 U.S. 372, 397. Today, twenty-three years later, that process is continuing and has been rapidly accelerated by the decision of the Court of Appeals in the case at bar.

2. The Court of Appeals Abused Its Discretion in Assessing Costs Against Petitioner and Thereby Denied Petitioner the Due Process of Law Guaranteed Him Under the Fifth Amendment.

On January 25, 1966, respondent filed in the Court of Appeals a verified bill of costs in the amount of $7,399.50. On the same day the Clerk notified petitioner's counsel that he proposed to tax such costs against petitioner and that any opposition thereto should be filed before the mandate issued (Appendix E). On February 1, 1966, petitioner filed a motion that he not be assessed respondent's costs (Appendix F). This motion was denied on February 16, 1966, without hearing (Appendix G).

Under Rule 31(3) and (4) of the Rules of the United States Court of Appeals for the First Circuit, (Appendix D) the court has the discretionary power to grant, withhold or divide costs in cases of reversal. In this case, there was a partial affirmance and a partial reversal. Such a situation is not covered by the rule. It is submitted that the judgment should be considered affirmed unless wholly

reversed. See *Babbitt* v. *Flynn*, 101 U.S. 7, 15 (1879). However, even assuming the court's discretionary power to assess costs against an appellee in some cases of partial reversal, such discretion was abused in the case at bar.

The decision of the Court of Appeals establishes respondent's liability, at least on the theory of libel, with only the question of damages remaining open. Thus, it is clear that petitioner's claim was neither frivolous nor lacking in merit, but was based upon a substantial wrong perpetrated by respondent. However, petitioner finds himself penalized over $7,000 for prosecuting a valid claim in the federal courts, and this penalty is imposed on account of an unselective reproduction by respondent of the entire record, most of which was neither referred to in its brief nor considered by the Court of Appeals. He is, therefore, remanded to the District Court, under a prohibitive personal liability, to vindicate, at further expense, the rights left to him by the Court of Appeals. One does not have to qualify for pauper's status to be unable to afford such a costly resort to the courts. It is submitted that legal process at such a price cannot be the due process contemplated by the Fifth Amendment.

Conclusion

For one hundred seventy-seven years the Constitutional guarantees of trial by jury and due process have induced the American people to submit disputes to orderly and peaceful adjudication. They have done so with confidence in the jealous protection accorded those guarantees by this Court. Now, when the tremendous work load of this Court precludes review of all but a comparatively small number of the cases competing for its attention, the inferior federal courts must assume a greater share of the responsibility for safeguarding these fundamental civil liberties. A Court

of Appeals does not discharge this responsibility by relegating to unresolved footnote status the only legitimate legal issues involved in a case, while at the same time displacing the jury, upsetting the jury's verdict and charging the appellee over $7,000 for his appellate hearing, all on the statistical probability that its decision will go unreviewed.

For all of the foregoing reasons, a Writ of Certiorari ought to be granted in this case.

Respectfully submitted,

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Appendix A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 62-81-J
WILLIAM R. HILL, JR.,
Plaintiff,
v.
SPERRY RAND CORPORATION,
Defendant.

COURT'S ACTION ON DEFENDANT'S MOTION FOR JUDGMENT IN ACCORDANCE WITH ITS MOTION FOR A DIRECTED VERDICT, OR, ALTERNATIVELY, FOR A NEW TRIAL

April 23, 1965

JULIAN, D. J.

The defendant's motion for judgment notwithstanding the verdict is denied.

The defendant's motion for a new trial is also denied.

The defendant's contention (par. 16, p. 6, of the Motion) that "the damages awarded by the jury are excessive as to both compensatory damages and as to exemplary damages or as to either of them," invites comment.

As to the compensatory damages ($50,000), it suffices to say that the amount does not exceed the limit that a jury could reasonably have awarded on the evidence.

More extended comment seems appropriate with respect to the exemplary damages of $200,000.

The defendant does not claim that the jury in arriving at its verdict was actuated by any improper motive. The Court in fact finds no indication that the verdict was the result of sympathy, prejudice, passion, or any other improper consideration.

Punitive damages are allowable not only to punish the defendant but also to deter him as well as others who might otherwise indulge in similar reprehensible conduct in the future.

The amount awarded as punitive damages in this case is undoubtedly sufficiently large to jolt the defendant. But punishment that does not hurt does not deter. The punishment imposed by the jury was directed at conduct which was designed to stimulate sales of a product and increase profits for the offender. Deterrence can be effectively maintained only by an award of punitive damages which will substantially affect the profit potential of such conduct.

It is the duty of the Court to keep a verdict for punitive damages from exceeding the limits of what is reasonable considering the purpose to be achieved as well as the facts in the particular case. See *Faulk* v. *Aware, Inc.*, 1963, Supreme Court, Appellate Div., 244 N.Y.S.2d 259, affirmed in 14 N.Y.2d 899 (1964).

On the evidence the jury could reasonably have found, among other facts, that the study and findings described in the offending article were fictitious; that the plaintiff's good name, standing, and reputation in the medical profession were knowingly misused by the defendant to give both the sham study and spurious findings (including the "scare" allusion to cancer) the ring of authenticity; that the preparation and publication of the article, the unauthorized use of the plaintiff's name, and the ensuing massive advertising campaign based on the article were an elaborately planned and deliberately executed scheme to exploit the plaintiff's standing and reputation in the field of dermatology for the purpose of promoting the sale of the defendant's electric shaver; that the defendant acted in reckless and wanton disregard of the plaintiff's reputation and knowingly used the plaintiff's name for advertising purposes without his consent.

Since there is no rigid formula for determining the limits beyond which a jury should not be permitted to go, the jury's award ought not be disturbed unless it is found to be clearly excessive.

Upon a careful review of the case the Court is not persuaded that the award is excessive.

United States District Judge

Appendix B

United States Court of Appeals
For the First Circuit

No. 6556.

SPERRY RAND CORPORATION,

DEFENDANT, APPELLANT,

v.

WILLIAM R. HILL, JR.,

PLAINTIFF, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
HASTIE* and MCENTEE, *Circuit Judges*.

Lawrence R. Cohen, with whom *Joseph W. Lobdell* and *Newton H. Levee* were on brief, for appellant.

C. Keefe Hurley, with whom *Earle C. Cooley* was on brief, for appellee.

OPINION OF THE COURT.

January 18, 1966.

ALDRICH, *Chief Judge*. Plaintiff, a citizen of Massachusetts, is a physician specializing in dermatology. Defendant is a Delaware corporation with principal offices in New York and Connecticut. Plaintiff brought this action in the district court for the District of Massachusetts, seeking damages for libel and for violation of New York's so-called right of privacy statute, N.Y. Civil Rights Law §51.[1] Although the publications complained of were made throughout the country, the case was sub-

*By designation.

[1] Plaintiff waived any claim for invasion of privacy in Massachusetts.

mitted on the basis of damages suffered in Massachusetts and New York, only. At the conclusion of the trial the jury answered a number of special questions. It awarded $50,000 actual damages, based upon libel in Massachusetts and New York and invasion of privacy under the New York statute, combined, and also awarded $200,000 punitive damages for libel and the right of privacy combined, limited to New York.[2] The court refused to direct a judgment n.o.v., or to grant a new trial, and defendant appeals.

The facts must be stated in some detail. Defendant manufactures an electric shaver known as the Remington, which is supposedly unique in having adjustable roller combs. In June 1958 defendant was approached by one Paul Murphy, who operated under the name of Medical Research Association, hereinafter MRA, and specialized in "medical public relations." Murphy reported upon a pilot study which indicated that the Remington was better for the skin than ordinary razors and other electric shavers. He proposed a more elaborate pilot study, and suggested that if it worked out, he would arrange for a medical research project to be financed by the defendant. If the project resulted in a paper published in a recognized medical journal, it would be used as the theme for a national advertising campaign. After an investigation of Murphy and his associates, which showed them to be apparently reliable, defendant agreed. Informed of the successful outcome of the second study, defendant entered into a written contract with MRA by means of two letters. We accept the following summary from plaintiff's brief.

> "The first letter was dated November 10, 1958. It provided that a 'protracted medical research study' was to be performed by a team of three dermatolo-

[2] Massachusetts does not allow punitive damages for libel. Mass. G.L. c. 231, §93.

gists on the staffs of leading institutions and the dermatologists selected had to be 'agreeable' to defendant.[3] The subjects of the study were to be approximately 240 males and 60 females. The study was to be conducted according to protocol previously established and agreed upon by MRA and defendant.[4] MRA agreed to make progress reports to defendant every 30-45 days and to keep confidential any unfavorable findings. After completion of the study, a medical report bearing the by-lines of the three doctors was to be prepared for publication in a mutually agreed upon national medical or scientific journal. However, the report was not to be submitted for publication without being reviewed and approved in writing by defendant. MRA, subject to the approval and control of defendant, was to obtain newspaper and magazine publicity throughout the United States and Canada.

"The second letter was dated November 11, 1958. It provided that defendant would be permitted to use the research as a basis for advertising claims, provided the names of the physicians and their institutions were not used. This proviso was agreed to be necessary under the established rules of ethics of the American Medical Association. Nevertheless, defendant would be permitted to make mailings of the medical journal report to members of the general public, as well as to doctors and medical institutions. It was agreed that nothing would be published without first being reviewed and approved in writing by the physicians. It was further agreed that MRA would receive $35,000 to cover the research, the three

[3] This meant only that defendant would approve their qualifications.
[4] This "protocol" established an elaborate research procedure.

dermatologists, the medical journal report and the reading of the report before a medical convention. MRA would receive an additional $50,000 for placing a story in 500 newspapers quoting one or more of the dermatologists and mentioning the trade name of defendant's electric shaver. Finally, if defendant wanted MRA to place magazine publicity, it would pay for the same according to a schedule of rates."

Pursuant to this contract Murphy entered into an agreement with a Dr. Finnerty, a dermatologist, under which Dr. Finnerty would arrange to collaborate with two other dermatologists to conduct the research and prepare a paper. At some point Dr. Finnerty proposed and Murphy agreed that the other doctors were to be the plaintiff and a Dr. Messina, now deceased. Murphy so informed the defendant, who approved the doctors without seeing them or having any communication with them. Periodically thereafter, as often as every two or three weeks, Murphy informed the defendant of the progress allegedly being made by the doctors. In fact the plaintiff, and possibly Dr. Messina as well, never participated in any study. What, if anything, Dr. Finnerty himself did, unquestionably fell notably short of the contract requirements.[5]

Whether plaintiff consented to the use of his name in connection with the study, or as a co-author of the article allegedly resulting therefrom, even though he did not in fact participate, was a matter of dispute at the trial. Dr. Finnerty testified that he met the plaintiff and Dr. Messina at a sidewalk cafe during the summer of 1958, that he

[5] Dr. Finnerty admitted various important departures from the contract besides his failure to obtain the participation of the other doctors. He was unable to furnish any records, or to give the name of a single patient who had participated in research which, supposedly, had required the use of 720 electric shavers.

told them he was conducting a study on shaving and would like to use their names as co-authors, that he would pay them $500 each when the paper was published, and that they both agreed. Dr. Messina, having died in December 1959, could not corroborate or deny this testimony. Plaintiff denied it. The jury, in answer to a special question, credited the plaintiff. While much of plaintiff's conduct makes it difficult to believe his denial, defendant did not contend, even on the motion for a new trial, that the evidence did not warrant the jury's finding. We, too, must accept it. However, on uncontradicted evidence introduced by the plaintiff, defendant's officers had no doubt, or reason to doubt, that the study was fully and properly carried out. Murphy's knowledge is another matter, and one question in the case is whether his knowledge is legally imputable to the defendant.

In due course the alleged results of the purported study were set out in a so-called long report which, if not written mainly by Murphy rather than Dr. Finnerty, at least contained many of Murphy's suggestions or improvements. This report was furnished to the defendant and gone over by its representatives together with Murphy and some of his associates. Various parties made suggestions, and eventually the report was rewritten into an article, primarily by an employee of Murphy. It has not been argued, and we find no basis for contending, that the article departed from the report in any basic manner, but it did, no doubt, give special prominence to alleged findings pleasing to the defendant, and defendant's shaver was the only one mentioned by name. In 1960, Murphy submitted the article entitled "Modern Shaving Techniques in Relation to Lesions of the Skin," to GP, a national medical magazine, which published it in March 1961.

Thereafter, defendant instituted an extensive national advertising campaign. It began with full-page advertise-

ments in the Boston newspapers in early May, 1961, and was followed by advertisements in magazines such as Life, Look and the Saturday Evening Post during the midsummer and fall of that year. These advertisements exploited the article, referring to it as the "Dermatologists' Report," and making much of the fact that the report was written by three supposedly prominent physicians. The advertisements did not identify the authors, but stated, "If you would like more information about 'The Dermatologists' Report,' your doctor may obtain it by writing" to a New York post office box. In response to requests throughout the summer and fall, defendant furnished a rather small number of reprints to doctors in Massachusetts and New York. Plaintiff's name, along with the names of the other two doctors, appeared as author.

We consider first plaintiff's action under the New York privacy statute,[6] and begin by posing a hypothetical case which may seem far removed from the case at bar. Suppose that a Dr. Black publishes in a medical journal an article, the import of which is that bicycling is good for the circulation of the middle-aged. Suppose, further, that the article comes to the attention of a manufacturer of bicycles who, without obtaining Dr. Black's consent, adverts to the article in advertisements for bicycles, summarizes its conclusions, and offers to send reprints to interested readers or their physicians. We do not believe that the courts of New York would hold the manufacturer's conduct actionable. No right of privacy attaches

[6] We are not without doubt whether, under Massachusetts choice of law rules, plaintiff, a domiciliary of the Commonwealth, could claim the benefits of this statute. See *Bernstein* v. *National Broadcasting Co.*, D.D.C., 1955, 129 F.Supp. 817, *aff'd*, 232 F.2d 369, *cert. den.* 352 U.S. 945; Restatement (Second), Conflict of Laws, §379g-h (Tent. Draft No. 9, 1964). In view of our disposition of the statutory claim, we do not reach this question.

to a matter of general interest that has already been publicly released in a periodical of national, albeit "specialized," circulation. The article, together with its author's name, has, in effect, been dedicated to public use.[7] *Cf. Gautier* v. *Pro-Football, Inc.*, 1952, 304 N.Y. 354; *Molony* v. *Boy Comics Publishers, Inc.*, App. Div., 1950, 98 N.Y.S.2d 119. If, on the other hand, Dr. Black had never written the article attributed to him, we have little doubt that an action would lie under the statute. *Cf. Goldberg* v. *Ideal Publishing Corp.*, Sup. Ct., 1960, 210 N.Y.S. 2d 928; *Ravich* v. *Kling*, Sup. Ct., 1959, 187 N.Y.S.2d 272.

This latter would be the situation at hand, were it not for the most inexplicable feature of this unusual case. After learning in March of the article's publication, plaintiff consulted counsel. Although plaintiff's testimony is replete with accounts of his continuous mental and other sufferings resulting from the publication and republications, he did nothing else. He did not complain to Dr. Finnerty. Although Dr. Messina was a close friend, he did not speak of it even to him. He did not communicate with GP.[8] Plaintiff testified that he saw the advertisements that appeared prominently in the Boston newspapers in May 1961. He continued to remain silent, although he now knew clearly that the matter had not come to an end.[9] Two months later the advertisements began to appear nationally. In November, plaintiff finally complained to defendant.

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[7] We say this with full awareness of the distinction that has been drawn between use "for advertising purposes" and use "for purposes of trade". See, *e.g.*, *Lahiri* v. *Daily Mirror, Inc.*, Sup. Ct., 1937, 295 N.Y.S. 382.

[8] Plaintiff's counsel wrote GP, but not until October. Even then it was not to inform GP that the article had not been authorized, but only to make inquiries.

[9] Plaintiff's reasons for delay in notifying defendant, quoted *infra*, as much as concede that he assumed the advertising campaign would continue.

Plaintiff's brief asks us "to judicially notice" that his five-month delay in notifying the defendant that he had not participated in the article was reasonable because defendant was "one of the country's largest corporations . . . [with an] elaborate and obviously expensive advertising campaign . . . ," so that full investigation was a condition precedent. In addition to the fact that it does not appear that plaintiff did any investigating between May and October (see preceding paragraph), we are less than clear what extended investigation was necessary. If plaintiff had not consented to the use of his name, no one knew it better than himself. By the same token, no one knew better than he that to the extent the advertising relied upon his name or reputation, it was a fraud, or at least a serious mistake of some sort.

Plaintiff's claim under the New York statute must rest upon the circumstance that he had not authorized the article in GP. On the basis of plaintiff's long silence, defendant asserts, in effect, that plaintiff is estopped to deny his authorship.[10] With respect to reprints distributed in connection with the national advertising campaign, and hence in New York, we must agree. Prior to the New York advertisements, by the simple act of writing a letter plaintiff could have forestalled further publication and distribution of the reprints, and the consequent harm allegedly suffered by him. Instead, for reasons not easily, or at least not charitably, divined, he chose to sit silently by, allowing the defendant reasonably to entertain the belief that because plaintiff's name appeared on the article he had in fact written it.

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[10] Plaintiff complains that defendant did not raise the question of estoppel in the district court. This is correct only in a very technical sense. At various stages of the proceeding defendant asserted this defense under the banners of "ratification," "laches," and "mitigation of damages." Plaintiff's knowledge of the advertisements and his ensuing silence were fully developed during the trial.

Of course, a party having knowledge of a fact cannot claim estoppel merely because he did not learn it from one who should have spoken, and we have assumed that defendant had no independent knowledge. We think this assumption inescapable. The evidence at the trial was uncontradicted that defendant (including its corporate employees) was unaware that plaintiff had not written the article or consented to his name being attached to it. When plaintiff notified defendant to the contrary, it took immediate steps to discontinue distribution of the article. Not only did the defendant not know earlier, but its ignorance was not unreasonable. Defendant had left the matter of dealing with the doctors to Murphy, an agent chosen with adequate care, and the agreement expressly required Murphy to obtain the consent of the participating doctors.

This does not end the matter. In answer to a special question, the jury found that Murphy was defendant's agent. The question remains whether, assuming Murphy knew that plaintiff did not approve the article, Murphy's knowledge can be imputed to the defendant. What an agent learns within the scope of his authority is, normally, imputed to the principal. However, an agent's knowledge of his own unauthorized acts is not imputed, Restatement (Second), Agency §280; *cf. Eastern Advertising Co.* v. *Standard Nut Co.*, 1928, 264 Mass. 238; *Innerarity* v. *Merchants' National Bank*, 1885, 139 Mass. 332, 333; Restatement (Second), Agency §91, at least when the agent has acted fraudulently toward his principal. *Tremont Trust Co.* v. *Noyes*, 1923, 246 Mass. 197, 206-07; *Kiamesha Development Corp.* v. *Guild Properties, Inc.*, App. Div., 1957, 164 N.Y.S.2d 958; *Fitch, Cornell & Co.* v. *Atchison, T. & S.F. Ry.*, App. Div., 1915, 155 N.Y.S. 1079, *aff'd*, 226 N.Y. 597. On plaintiff's own interpretation, Murphy's con-

duct, to the extent he failed to obtain plaintiff's consent and, a fortiori, to the extent he knew plaintiff had not written the article, was a deliberate violation of the agreement with his principal and a fraud upon the principal.[11]

In a case where the principal is attempting to avoid liability to an innocent party, a greater adverse interest on the agent's part might well be required before insulating the principal from his agent's knowledge. *Cf.* Seavey, Agency 184-85 (1964). The fiction of imputed knowledge, however, does not exist apart from the policies it serves, and under the present circumstances, in view of plaintiff's conduct, we conclude as a matter of law that defendant was not constructively notified because of any knowledge Murphy may have possessed. We hold that defendant justifiably relied on plaintiff's unjustifiable silence, and that it would be unconscionable to allow plaintiff presently to deny his authorship in order to recover damages accruing on or after July, when the New York advertising commenced.[12] *Cf. Looney* v. *Trimount Theatres, Inc.*, 1933, 282 Mass. 275; *United Shoe Machinery Co.* v. *Bresnahan Shoe Machinery Co.*, 1908, 197 Mass. 206,

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[11] Murphy's misconduct was doubtless self-interested; at the least to reduce his own work, at worst to fabricate an article which he could persuade defendant to pay him to circulate.

[12] In holding plaintiff estopped to deny his authorship of the article we need not hold that he is estopped to deny that he specifically consented to defendant's commercial use of his name, for, as we have pointed out, if plaintiff wrote the article his consent would not have been necessary. We note, however, that even though the New York decisions might preclude an absolute defense of estoppel to deny consent when written consent was necessary, *Lomax* v. *New Broadcasting Co.*, App. Div., 1963, 238 N.Y.S.2d 781, conduct indicating consent may be considered in mitigation of damages. *Ibid.*; *Miller* v. *Madison Square Garden Corp.*, Sup. Ct., 1941, 28 N.Y.S.2d 811. Under this theory, plaintiff could not recover for damages he could have avoided after it became evident that defendant would continue its advertising campaign. *Cf. Den Norske Amerikalinje Actiesselskabet* v. *Sun Printing & Publishing Ass'n*, 1919, 226 N.Y. 1; McCormick, Damages, §37 (1935).

215; *Shepard & Morse Lumber Co.* v. *Eldridge,* 1898, 171 Mass. 516; *Rothchild* v. *Title Guarantee & Trust Co.,* 1912, 204 N.Y. 458, 462; *Slud* v. *Guild Properties, Inc.,* Sup. Ct., 1952, 119 N.Y.S.2d 347; *aff'd,* 116 N.Y.S.2d 748, *rev'd on other grounds,* 164 N.Y.S.2d 958; Restatement (Second), Agency §8B(1)(b); and see *Shapleigh Hardware Co.* v. *McCoy & Son,* 1919, Ga. App., 98 S.E. 102. *But cf. New York Rubber Co.* v. *Rothery,* 1887, 107 N.Y. 310.

We have no problem with plaintiff's claim for compensatory damages for libel. The jury was clearly warranted in finding that defendant was, at least jointly, responsible for publication of the article in GP. Expert testimony permitted the jury to find that the unauthorized attribution of the article to plaintiff was defamatory. Among the reasons given for saying that the article reflected unfavorably on him were that it was poorly written, scientifically inadequate on its face, and medically unsound. In addition, some physicians would consider it unethical because of the undisguised preference for one manufacturer's product and the mention of its name. Such attributions of lack of ethics to the plaintiff, as well as the deficiencies in the article itself, could be found defamatory. See *Themo* v. *New England Newspaper Pub. Co.,* 1940, 306 Mass. 54, 56-57; *Clevenger* v. *Baker Voorhis & Co.,* Ct. App., 1960, 203 N.Y.S.2d 812. There must be a new trial on the issue of compensatory damages, however. The verdict of $50,000 does not segregate damages for libel from damages under the New York statute which, we have held, cannot be recovered.

We reach, finally, the matter of punitive damages for libel under the law of New York,[13] and conclude that New

[13] This aspect of the case raises two interesting questions of choice of law which we note, but which, because of our disposition of the issue on the merits, we do not answer. One is whether the law of New York is applicable at all. *Compare Zuck* v. *Interstate Publishing*

York would not permit recovery on the facts of this case.

Exemplary damages serve to deter and punish conduct that is morally culpable. *Faulk* v. *Aware, Inc.*, App. Div., 1963, 244 N.Y.S.2d 259, *aff'd*, 252 N.Y.S.2d 95, *modified*, 253 N.Y.S.2d 990, *cert. den.* 380 U.S. 916. They are awarded for libel only when the tortfeasor has acted with actual malice, or "with such gross negligence and carelessness as to indicate a wanton disregard of the plaintiff's rights." *Campanella* v. *Pursley*, Sup. Ct., 1960, 202 N.Y.S.2d 539, 543; *Holmes* v. *Jones*, Ct. App., 1895, 147 N.Y. 59. Without repeating our earlier discussion of the state of defendant's corporate mind, we believe it is determinative of this issue. Defendant had every reason to believe that plaintiff had authorized the article. The evidence would not warrant a finding that it was reckless in its selection of MRA, or in its reliance upon Murphy's reports of the doctors' supposed activities. Under these circumstances, to impute to defendant Murphy's knowledge of his own violation of the agreement would punish defendant when it was not blameworthy. *Cf. Cleghorn* v. *New York C. & H.R.R.R.*, 1874, 56 N.Y. 44; Restatement

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Corp., 2 Cir., 1963, 317 F.2d 727, 734; *Dale System* v. *Time, Inc.*, D.Conn., 1953, 116 F.Supp. 527; *Kelly* v. *Loew's, Inc.*, D.Mass., 1948, 76 F.Supp. 473; *Curley* v. *Curtis Publishing Co.*, D. Mass., 1942, 48 F.Supp. 29; Restatement (Second), Conflict of Laws §379e (Tent. Draft No. 9, 1964), *with Hartmann* v. *Time, Inc.*, 3 Cir., 1948, 166 F.2d 127, *cert. den.* 334 U.S. 838; *Brewster* v. *Boston Herald-Traveler Corp.*, D.Mass., 1960, 188 F.Supp. 565; *O'Reilly* v. *Curtis Publishing Co.*, D.Mass., 1940, 31 F.Supp. 364. The other, assuming New York law is otherwise applicable, is whether Mass. G.L. c. 231, §93, which provides that "in no action of slander or libel shall exemplary or punitive damages be allowed," would preclude an award of punitive damages for publications within New York. *Cf.* Cheatham & Reese, Choice of the Applicable Law, 52 Colum. L. Rev. 959, 961 (1952); *Lauritzen* v. *Larsen*, 1953, 345 U.S. 571; Leflar, Extrastate Enforcement of Penal and Governmental Claims, 46 Harv. L. Rev. 193, 210-11 (1932). *But cf.* Restatement (Second), Conflict of Laws §612 (Tent. Draft No. 11, 1965).

(Second), Agency §217C. The finding of punitive damages cannot stand.

Judgment will be entered vacating the judgment of the District Court and setting aside the general verdict and the findings inconsistent with this opinion, and remanding the action for trial on the issue of compensatory damages for libel.

Appendix C

NEW YORK CIVIL RIGHTS LAW

"Article 5-Right of Privacy

§50-Right of Privacy

A person, firm or corporation that uses for advertising purposes, or for purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

§51-Action for Injunction and for Damages

Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use, and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared unlawful by the last section, the jury, in its discretion, may award exemplary damages. . . ."

Appendix D

Rule 31(3) and (4) of the Rules of the United States Court of Appeals for the First Circuit.

"31(3) In cases of reversal by this court of any order, judgment or decree, costs shall be allowed to the appellant or petitioner, unless otherwise ordered by the court. The costs of preparing, certifying and transmitting the record on appeal from the court below, the premium on the cost or supersedeas bond and the fee for filing the notice of appeal shall be taxable in that court, when costs are allowed in this court.

"(4) The actual cost of printing or typing briefs with the appendices provided in Rule 23, in an amount not exceeding $5.50 per page (including cover and tables of contents and citations), and the actual cost of patents or reproductions inserted in an appendix, shall be taxed as costs in the case; provided that, when in the opinion of the court unnecessary matter has been printed or typed it may withhold or divide costs as justice may require. . . ."

Appendix E

[Letterhead — United States Court of Appeals]

January 25, 1966

To Counsel.

No. 6556. *Sperry Rand Corporation* v. *William R. Hill, Jr.*

Dear Sirs:

The costs I propose to tax in this case in favor of appellant are as follows:

Docketing fee	$ 25.00
Printing brief for appellant (cover, 7 pp. of table of contents and pp. 1 to 82, inclusive) 90 pp. at $5.50 per page (limitation under our Rule 31(4)	495.00
Printing 2-volume record appendix to brief for appellant:	
Two covers at $5.50 per page (limitation as above)	11.00
(6 pp. table of contents, pp. 1 to 11, 21 to 879, 903 to 912, 945 to 947, 977, 981 to 986, 989 to 992, 995 to 997, 1017 to 1023, 1031, and 1035 to 1038) 916 pages at $5.25 which actual cost is less than the above limitation	4,809.00
Actual cost of reproductions inserted in record appendix ($1,424.50 plus $249.00)	1,673.50
Actual cost of other reproductions	386.00
TOTAL	$7,399.50

The total amount will be inserted in the mandate which is due February 2, 1966. Any opposition to this proposed

taxation should be filed promptly so that any question may be resolved before mandate issues.

Sincerely yours,
ROGER A. STINCHFIELD, Clerk
By: (s) DANA H. GALLUP
Chief Deputy Clerk.

DHG: jmm
Lawrence R. Cohen, Esquire, 209 Washington Street, Boston, Mass. 02108
C. Keefe Hurley, Esquire, 60 State Street, Boston, Mass. 02109

Appendix F

MOTION FOR AN ORDER THAT DEFENDANT, APPELLANT'S COSTS NOT BE ASSESSED AGAINST PLAINTIFF, APPELLEE

Plaintiff, Appellee hereby moves for an order that the costs of Defendant, Appellant not be assessed against him. This motion is made on the following grounds:

1. In cases of reversal, the allowance of costs to the Appellant is solely within the discretion of this Court under Rule 31(3).

2. Although the judgment of the District Court has been reversed, the decision of this Court establishes the liability of the Defendant, Appellant to the Plaintiff, Appellee, at least on the theory of libel, with only the questions of damages remaining open. Thus, it is clear that the Plaintiff, Appellee's claim was neither frivolous nor lacking in merit, but was based upon a substantial wrong perpetrated by the Defendant, Appellant.

3. The costs of $7,399.50 which are proposed to be taxed in favor of Defendant, Appellant are excessive and prohibitive and their imposition on Plaintiff, Appellee will unfairly penalize him for prosecuting a valid claim in the federal courts.

4. Although the entire record from the court below, consisting of 1,038 printed pages, was filed by Defendant, Appellant as an appendix to its brief, the great bulk of such material was never referred to or utilized as a record reference in such brief. It is therefore unfair to assess the Plaintiff, Appellee the costs of such an unselective reproduction of the record.

5. The assessment against Plaintiff, Appellee of costs in the amount of $7,399.50 in connection with the prosecu-

tion of a valid non-frivolous claim would constitute a denial of due process of law.

By his attorneys,

C. KEEFE HURLEY
EARLE C. COOLEY
60 State Street
Boston, Massachusetts

Appendix G

ORDER OF COURT

February 16, 1966.

Upon consideration of motion of appellee for an order that the proposed costs of $7,399.50 be not assessed against him, and of memorandum in opposition thereto,

It is ordered that said motion be, and the same hereby is, denied.

By the Court:

(s) ROGER A. STINCHFIELD
Clerk.

[cc: Messrs. Cohen and Hurley.]